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10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA
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13 DAYNE ALEXANDER,

14 Plaintiff,

15 v.

16 UNITED STATES OF AMERICA, et
17 al.,

18 Defendant.
19

CASE NO: 14-CV-0137 W (KSC)

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS WITHOUT LEAVE TO
AMEND [DOC. 6]**

20 Pending before the Court is Defendant United States of America's motion to
21 dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff Dayne
22 Alexander opposes.

23 The Court decides the matters on the papers submitted and without oral
24 argument. See Civ. L. R. 7.1(d.1). For the reasons discussed below, the Court
25 **GRANTS** the motion to dismiss [Doc. 6] and **ORDERS** the case **DISMISSED**
26 **WITHOUT LEAVE TO AMEND**.
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1 **I. BACKGROUND**

2 This lawsuit arises from an injury suffered by Plaintiff Dayne Alexander while
3 working out at the Olde Gym at the Naval Base San Diego. (*Compl.* [Doc. 1], ¶11.)
4 Alexander contends that while using the Maxicam Squat Rack Stairstep 2020, the
5 machine collapsed on him resulting in a fracture of the left femur, and later requiring
6 several surgeries. (*Id.*, ¶ 12.)

7 On March 7, 2012, Alexander submitted a claim with Defendant United States
8 for \$850,000 under the Federal Tort Claims Act (“FTCA”). (*Opp.* [Doc. 7], 5:14–15.)
9 On November 12, 2012, Defendant denied the claim, and on March 8, 2013,
10 Alexander filed a lawsuit in the Southern District of California entitled, Alexander v.
11 United States of America, Civil Case No. 13cv545 (the “Alexander I”).

12 Shortly after the lawsuit was filed, on July 3, 2013, Alexander filed a motion
13 seeking “leave to file a First Amended Claim Form, or in the alternative, to dismiss
14 [the] complaint and then file a new claim form followed by refilling [sic] of complaint.
15 . . .” (*See Notice of Mt.* [Doc 7 in Alexander I], 1:22–25.) According to the motion,
16 after the government claim was submitted, Alexander learned that he would require
17 more medical care and periods of recovery during which he would not be able to work.
18 (*Memo of P&A* [Doc. 7-1 in Alexander I], 3:8–10, 6:22–23.) As a result, Alexander
19 sought to amend his FTCA claim to increase the damages sought from \$850,000 to \$6
20 million. (*Id.*, 6:1–2.)

21 On December 28, 2013, this Court issued an Order Granting In Part and
22 Denying In Part Plaintiff’s Motion to Amend or Dismiss Without Prejudice. (*See Order*
23 [Doc. 24 in Alexander I].) With respect to Alexander’s request to amend his FTCA
24 claim, Alexander failed to identify any authority allowing a claimant to file a motion to
25 amend an FTCA claim in district court. (*Id.*, 3:9–11, 3:20–26.)

26 The Order explained, however, that notwithstanding the lack of authority to
27 move to amend a claim in district court, 28 U.S.C. § 2675(b) allowed Alexander to
28 seek damages in excess of \$850,000 in Alexander I if he could demonstrate that “the

1 increased amount is based upon newly discovered evidence not reasonably discoverable
2 at the time of presenting the claim to the federal agency, or upon allegation and proof
3 of intervening facts, relating to the mount of the claim.” (*Order*, 3:28–4:3.) But the
4 *Order* further explained that the cases allowing claimants to pursue larger damage
5 claims made the determination that the increased damages were based on newly
6 discovered evidence “at trial, not at the start of the litigation before discovery has been
7 conducted.” (*Id.*, 4:4–6.) Because Alexander I was still in the early stages of discovery,
8 the Court found that evaluating whether “Alexander’s increased damages are based on
9 newly discovered evidence at this stage in the litigation would be prejudicial to
10 Defendant,” particularly given that Alexander’s motion was based on evidence in his
11 possession. (*Id.*, 4:23–5:3.) The *Order*, therefore, notified Alexander that as an
12 alternative to dismissing the case, he could “proceed with this litigation and seek a
13 determination about whether his increased damage claim is based on newly discovered
14 evidence at the appropriate time.” (*Id.*, 6:3–5.) Instead, on December 26, 2013,
15 Alexander filed a request for dismissal without prejudice, which was granted on
16 December 30, 2013.

17 Meanwhile, on December 23, 2013, Alexander filed a second or amended
18 government claim form, which was rejected on January 16, 2014. On January 17, 2014,
19 Alexander filed this lawsuit, and Defendant’s motion to dismiss followed.

20 21 **II. DISCUSSION**

22 The FTCA provides, in part, that “a tort claim against the United States shall
23 forever be barred . . . unless action is begun within six months after the date of mailing,
24 by certified or registered mail, notice of final decision of the claim by the agency to
25 which it was presented.” 28 U.S.C. § 2401(b). Thus, a claimant “must file suit within
26 six months of administrative denial of the claim.” Dyniewicz v. United States, 742 F.2d
27 484, 485 (9th Cir. 1984). “Failure to satisfy this requirement deprives a court of subject
28 matter jurisdiction.” Galvan v. United States, 957 F.Supp.2d 1182 (E.D. Cal. 2013).

1 Here, the United States denied Alexander's claim on November 12, 2012. Based
2 on this date, the limitations period expired on May 12, 2013. Because Alexander I was
3 filed on March 8, 2013, that lawsuit was timely. This case, however, was filed on
4 January 17, 2014, well beyond the 6-month FTCA limitations period. Accordingly, the
5 lawsuit is time barred as to the United States.

6 Alexander, nevertheless, argues that equitable tolling should apply to save his
7 case. However, Alexander's argument is not supported by any authority and is contrary
8 to the Ninth Circuit's decision in Lehman v. United States, 154 F.3d 1010 (9th Cir.
9 1998).¹

10 In Lehman, plaintiffs filed an FTCA claim after being struck and injured by a
11 U.S. Postal Service truck. The claim was rejected and plaintiffs filed a timely lawsuit.
12 Plaintiffs later voluntarily dismissed the lawsuit without prejudice, relying on an
13 agreement with the government's attorney that the action "would be voluntarily
14 dismissed until Ms. Lehman's medical condition had stabilized, at which point
15 settlement negotiations' would resume." Id. at 1012. According to plaintiffs, defense
16 counsel later repudiated the agreement and refused to settle. Plaintiffs then filed a new
17 lawsuit, more than a year after the Postal Service denied plaintiffs' FTCA claim, and
18 the government moved to dismiss the new case as time barred. The district court
19 granted defendant's motion.

20 On appeal, plaintiffs argued that the statute of limitations should be equitably
21 tolled based on the government's agreement to allow plaintiff to voluntarily dismiss the
22 original lawsuit in order to engage in settlement negotiations. Lehman, 154 F.3d at
23 1015. Plaintiffs also argued that equitable tolling was justified because defense counsel

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25 ¹Alexander's primary argument in opposition is that equitable tolling should apply. He also
26 suggests that the Court should deem his December 23, 2013 FTCA claim as the operative claim for
27 evaluating the 6-month FTCA limitations period, but he provides no supporting authority. (*Opp.*,
28 10:2-4.) Moreover, Alexander's argument is unpersuasive because it would create a large loophole
in the 6-month limitations period by allowing a claimant to restart that period by simply filing a second
claim within two years after the original claim accrued.

1 never advised plaintiffs' counsel that the lawsuit would need to be re-filed within 6
2 months of the denial of the original FTCA claim. Id.

3 The Ninth Circuit explained that equitable tolling is applied sparingly, for
4 example, "when the statutes of limitations was not complied with because of defective
5 pleadings, when a claimant was tricked by an adversary into letting a deadline expire,
6 and when the agency's written notice of the statutory period was clearly inadequate."
7 Lehman, 154 F.3d at 1016 (quoting Scholar v. Pacific Bell, 963 F.2d 264, 267–268 (9th
8 Cir. 1992)). However, "the doctrine is not available to avoid the consequences of one's
9 own negligence," such as "*when a late filing is due to claimant's failure 'to exercise due*
10 *diligence in preserving his legal rights.*" Id. (emphasis in original). Nor is opposing counsel
11 obligated to advise his or her adversary about the statute of limitations. Because
12 defense counsel did not make any misrepresentations regarding the statute of
13 limitations or the effect of plaintiffs' voluntary dismissal, the Ninth Circuit found that
14 plaintiffs failed to demonstrate their "ignorance of the limitations period was excusable"
15 and affirmed the dismissal. Id. at 1016.

16 Here, the argument for equitable tolling is even less compelling than in Lehman.
17 Unlike Lehman, there is no question that Alexander's decision to dismiss Alexander
18 I was solely the result of his or his attorney's strategy. Alexander I was not dismissed
19 because of any agreement between the parties, but instead was the direct result of
20 Alexander's motion requesting that the Court allow him to dismiss the case without
21 prejudice. In fact, Defendant opposed Alexander's request, and this Court's Order in
22 Alexander I provided him with an alternative to dismissing the case:

23 Alexander may proceed with this litigation and seek a determination
24 about whether his increased damage claim is based on newly discovered
25 evidence at the appropriate time.
26 (Order, 6:3–5.) Thus, unlike Lehman, where plaintiff was arguably encouraged by
27 defense counsel to dismiss the case, Alexander's decision to dismiss Alexander I was
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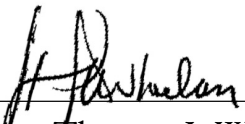
1 based on his or his counsel's strategy. Accordingly, equitable tolling does not apply to
2 this case.²

3 4 **III. CONCLUSION & ORDER**

5 For the foregoing reasons, the Court **GRANTS** Defendant United States' motion
6 to dismiss [Doc. 6], and **ORDERS** this case **DISMISSED WITHOUT LEAVE TO**
7 **AMEND**. In light of this order, Plaintiff's motion for leave to amend [Doc. 12] is
8 **TERMINATED**.

9 **IT IS SO ORDERED.**³

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11 DATED: May 5, 2014



Hon. Thomas J. Whelan
United States District Judge

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17 ² Alexander also appears to suggest that the delay in deciding his motion to amend in
18 Alexander I somehow contributed to his procedural problems. But Alexander's FTCA claim was
19 denied on November 12, 2012, and Alexander I was filed on March 8, 2013. Thus, the 6-month
20 FTCA limitations period expired well before the motion was even filed, and any "delay" in deciding
21 the motion did not contribute to or cause his statute of limitations problem.

22 Additionally, Alexander appears to assert that Defendant's motion to dismiss should be denied
23 because his dismissal of Alexander I and attempt to amend his claim form was approved or sanctioned
24 by this Court: "Plaintiff requests this court recognize Plaintiff's December 23, 2013 claim form as the
25 'operative' claim form filed consistent with and per this court's December 18, 2013 order." (*Opp.*,
26 4:19–21.) This assertion lacks merit. The Court's responsibility is to decide motions filed by the
27 parties. Here, Alexander's motion in Alexander I requested an order amending his claim form or,
28 alternatively, allowing him to voluntarily dismiss the case without prejudice. Based on the applicable
law, this Court determined that it could not grant a motion to amend, but Alexander was entitled to
dismiss the case without prejudice. The Court was not asked, and did not determine, whether
dismissal was wise or would create procedural problems for Alexander.

³ Alexander's opposition also requests that the Court set aside his voluntary dismissal in
Alexander I. Because Alexander's request is more appropriately decided in Alexander I, the Court
need not address that issue here.